IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COUNCIL TREE COMMUNICATIONS, INC., BETHEL NATIVE CORPORATION, AND THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL	)	
Petitioners,	)	
v.	)	**No. 06-2943**
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
Respondents.	)	

OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION
TO EMERGENCY MOTION FOR STAY PENDING REVIEW

Council Tree Communications, Inc., joined by two other petitioners (collectively, "Council Tree"), seeks a stay both of eligibility rules adopted by the Federal Communications Commission that apply to certain kinds of licenses to provide wireless services,[1] and of an August 9, 2006, auction of Advanced Wireless Service ("AWS") licenses to which those rules will apply. The rules concern the eligibility of certain small businesses – known as "designated entities" or "DEs" – for benefits that can include bidding credits of up to 25%. The Commission adopted these rules through notice-and-comment rulemaking after several parties, including Council Tree itself, expressed

[1] *Implementation of the Commercial Spectrum Enhancement Act & Modernization of the Commission's Competitive Bidding Rules and Procedures*, 21 FCC Rcd 4753 (2006) ("*Second Report & Order*"), *recon.* FCC 06-78 (released June 2, 2006) ("*Reconsideration Order*"). Copies of these orders are attached as Exhibits 1 and 2 to Council Tree's petition for review.

concern that existing rules did "not adequately prevent large corporations from structuring relationships [with DEs] in a manner that allows them to gain access to benefits reserved for small businesses."[2] And the Commission chose to apply the rules to the August 2006 auction only after commenters, again including Council Tree, urged that the amended rules be made applicable immediately and that the auction not be delayed.[3]

Dissatisfied with the manner in which the Commission chose to address the problem that Council Tree had identified, Council Tree now asks this Court to stay the rules and the upcoming auction. Council Tree has not satisfied any of the criteria for granting a stay, and its motion should be denied.

Council Tree does not have a likelihood of success on the merits. It asserts that the rules violate provisions of the Communications Act intended to encourage the participation of DEs in spectrum auctions. But in fact, the rules – which Council Tree concedes are entitled to *Chevron* deference – strike a balance among the competing policy goals set out in the statute, and Council Tree has not come close to showing that they are unreasonable. Council Tree's claims under the Administrative Procedure Act and the Regulatory Flexibility Act fare no better, since the record shows that the Commission fully complied with these statutes by giving notice of the rules and the subjects and issues that it was considering.

Equitable factors also counsel against a stay. Assuming that Council Tree will be harmed in the absence of a stay, it has not shown that this harm would be irreparable.

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[2] *Implementation of the Commercial Spectrum Enhancement Act & Modernization of the Commission's Competitive Bidding Rules and Procedures*, 21 FCC Rcd 1753, ¶ 12 (2006) ("*Further Notice*").

[3] *Reconsideration Order* ¶ 13.

Conversely, the grant of a stay would cause harm both to other parties and to the public interest. Council Tree itself (Mot. 3) describes the August 2006 AWS auction as "the largest spectrum auction in United States history and one that holds the promise of bringing high speed digital communications to even the most remote parts of this country." The auction is the product of years of significant coordination between the FCC and other federal agencies to relocate existing government users of the pertinent spectrum so that it could be available for licensing at auction. A stay would harm the public interest by delaying the significant public benefits of the auction and frustrating the substantial public and private efforts invested in bringing it to fruition – directly contrary to Congress's intent that spectrum auctions be used to promote the "rapid deployment of new technologies, products and services for the benefit of the public . . . without administrative or judicial delays."[4]

STATEMENT

In the orders under review, the Commission revised its rules governing eligibility for DE benefits, such as bidding credits, that the Commission accords small businesses to carry out Congress's objective that such entities have an opportunity to participate in the provision of spectrum-based services.[5] After reviewing comments, and taking into account its experience in administering the DE program, the Commission revised its DE rules in two relevant respects.

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[4] 47 U.S.C. § 309(j)(3)(A).

[5] *See* 47 U.S.C. §§ 309(j)(3)(B) & 309(j)(4)(D). Though the Commission's rules define "designated entities" as "small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies" (47 C.F.R. § 1.2110(a)), since the Supreme Court decided *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), DE bidding credits have been available only to small businesses and, to a lesser extent, rural telephone companies. *See Second Report & Order* ¶ 3 n.8.

First, the Commission tightened its DE eligibility rules regarding lease and resale arrangements (referred to below as the "material relationship" rules) in an effort to ensure that every recipient of DE benefits "is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public."[6] Second, the Commission strengthened its "unjust enrichment" rules – which recapture DE benefits when ineligible entities acquire control of, or impermissible influence over, DEs – "in order to better deter entities from attempting to circumvent [the] designated entity eligibility requirements."[7] Specifically, it required DEs to repay some or all of their bidding credits if they lose their eligibility within ten years (rather than the five-year term under the old rules).

Although the Commission itself has moved the AWS auction date from June to August to give prospective participants additional time for preparation and planning in light of the rule changes it adopted, Council Tree now seeks a stay, pending completion of judicial review, of the revised DE rules and of the August 9, 2006, auction.[8]

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[6] *Reconsideration Order* ¶ 3.

[7] *Id*. ¶4.

[8] In its petition for review, Council Tree notes that it filed a petition for administrative reconsideration of the *Second Report & Order*, but that the Commission has not formally ruled on that petition. This suggests that the orders on review may be nonfinal as to Council Tree and thus not currently reviewable. In our view, this jurisdictional question – while crucial to any ultimate disposition of the petition for review – is not relevant to the disposition of the stay motion. In particular, even if the pendency of the petition for reconsideration requires dismissal of the petition for review, the Court would retain power under the All Writs Act, 28 U.S.C. § 1651, to consider whether to grant a stay in aid of its future jurisdiction. The standards for preliminary injunctive relief under the All Writs Act coincide with the "well established requirements [the Court] routinely appl[ies]

ARGUMENT

To obtain the extraordinary remedy of a stay, a party must demonstrate that: (1) it will likely prevail on the merits of its claim; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be harmed if a stay is granted; and (4) the grant of a stay will advance the public interest.[9] This Court has held that a party is entitled to a stay only if it "produces evidence sufficient to convince the . . . court that *all four factors* favor preliminary relief."[10] As we demonstrate below, Council Tree has not made any of the four showings necessary to justify its request for extraordinary relief.

I. COUNCIL TREE IS NOT LIKELY TO PREVAIL ON THE MERITS.

A. Section 309(j)

Council Tree argues (Mot. 9-13) that the changes to the "material relationship" rules and the lengthening of the unjust enrichment period violate section 309 of the Communications Act. This claim lacks merit because the Commission's order reflects a reasonable resolution of statutory ambiguity and should therefore be upheld under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Section 309(j) directs the Commission to distribute many spectrum licenses by competitive bidding, and to "promote" a series of "objectives," including "the development and rapid deployment of new technologies, products, and services for the benefit of the public . . . without administrative or judicial delays," "promoting economic

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to motions for stay pending appeal." *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762-63 (D.C. Cir. 1985).

[9] *See New Jersey Hosp. Ass'n v. Waldman*, 73 F.3d 509, 512 (3d Cir. 1995); *see also In re Penn Cent. Transp. Co.*, 457 F.2d 381, 384-85 (3d Cir. 1972).

[10] *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994) (emphasis added).

opportunity and competition," and "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource."[11] It also directs the Commission to balance a number of factors when issuing auction regulations, including not only "ensur[ing] that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services," but also imposing "performance requirements" on successful bidders, and adopting such "antitrafficking restrictions . . . as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses."[12] It leaves to the Commission the choice of specific "bidding methodology."[13]

As Council Tree concedes (Mot. 9), the Commission's interpretation of Section 309 is entitled to deference under *Chevron*. To prevail at step one of the *Chevron* analysis, Council Tree must show that "the statute speaks clearly 'to the precise question at issue.'"[14] In other words, it must demonstrate that the plain terms of the statute prohibit the Commission from extending the unjust enrichment period from five years to ten years and from considering lease or resale of a substantial portion of a DE's spectrum capacity as a relevant material relationship that could jeopardize an entity's DE eligibility. Because the statute is silent on these questions, Council Tree's argument fails.

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[11] 47 U.S.C. § 309(j)(3).
[12] *Id.* § 309(j)(4).
[13] *Id.* § 309(j)(3).
[14] *Barnhart v. Walton*, 535 U.S. 212, 217-18 (2002) (quoting *Chevron*, 467 U.S. at 842-43); *see also id.* at 218 (relevant inquiry is "whether the statute unambiguously forbids the Agency's interpretation").

As an initial matter, Section 309(j) does not even require the use of bidding credits. *See* 47 U.S.C. § 309(j)(4)(D) (directing the Commission to "*consider* the use of tax certificates, bidding preferences, and other procedures" to assist small business bidders (emphasis added)). There is thus no basis for Council Tree's claim that the statute dictates specific rules governing eligibility for them. Instead, Congress left it to the Commission to resolve such matters if and when the Commission chooses to adopt bidding credits at all.[15]

Given the "gap[s]" left in the statute, the only relevant question is that posed by step two of the *Chevron* analysis: whether the Commission's construction is "permissible."[16] And where, as here, an agency is charged with balancing a number of statutory objectives (such as promoting opportunities for bona fide DEs and preventing unjust enrichment), its choice is owed particular deference.[17] *See National Ass'n of Regulatory Utility Com'rs v. SEC*, 63 F.3d 1123, 1127 (D.C. Cir. 1995) (agency's "rational attempt to balance competing statutory policies" must be affirmed).

Having recently "witnessed a growing number of complex [financial and operational] agreements" between DEs and non-DEs that "underscore[d] the need for stricter regulatory parameters," the Commission reasonably concluded that allowing certain agreements to lease licenses or permit resale of substantial amounts of the

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[15] As mentioned, the provision confers discretion on the Commission to decide how best to balance the broad statutory objectives. In doing so, the Commission has taken a number of steps in addition to the use of bidding credits to encourage the participation of small businesses. For example, it has created a number of small geographic licensing areas and spectrum block sizes so that DEs will have an array of less expensive options that are more likely to satisfy their business needs. *Service Rules for Advanced Wireless Services in the 1.7 GHZ and 2.1 GHZ Bands*, 18 FCC Rcd 25,162, 25,189 ¶ 68 (2003).
[16] *Chevron*, 467 U.S. at 843.
[17] *Id.* at 845.

spectrum capacity covered by an FCC license would be inconsistent with the statutory requirements that it prevent unjust enrichment and that it ensure that "every recipient of . . . designated entity benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public."[18] The statute directs the Commission to assist only DEs that will truly "participate in the provision of spectrum-based services."[19] The Commission reasonably concluded that this phrase reflected Congress's intent that DEs be actively involved in the provision of services to the public, rather than acting as passive holders of a spectrum license used by others to provide service.[20] Far from showing that this interpretation is unreasonable, Council Tree offers no plausible explanation for why Congress would have intended valuable DE benefits to go to entities planning to lease or permit resale of a substantial portion of their spectrum capacity to others. The fact that such arrangements may have been part of Council Tree's business plan does not mean that they are protected by the statute.[21]

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[18] *Second Report & Order* ¶¶ 21, 15 & n.57.

[19] 47 U.S.C. § 309(j)(4)(D).

[20] *Reconsideration Order* ¶ 3 & n.8. The Commission also noted that the legislative history of section 309(j) indicated that Congress intended the prohibition on unjust enrichment to prevent entities with "no intention of offering service to the public" from receiving DE benefits. *Id.*; *Second Report & Order* ¶ 15 & n.57.

[21] Council Tree argues (Mot. 15 n.24) that the Commission acted arbitrarily and capriciously in selecting the 25% and 50% thresholds for evaluating lease and resale arrangements. This argument lacks merit. In addressing lease and resale arrangements, the Commission had to draw the line somewhere. In prohibiting lease and resale arrangements for more than 50 percent of a DE's spectrum capacity, the Commission made the common-sense determination that a "designated entity [should] preserve[] at least half of the spectrum capacity of each license for which the designated entity has been awarded and retained designated entity benefits in exchange for the provision of service as a facilities-based provider for the benefit of the public." *Reconsideration Order* ¶ 24. Arrangements covering between 25 and 50 percent of a DE's capacity are not prohibited, but are merely "attributable" to the applicant for purposes of determining its eligibility for the valuable DE benefits. *Second Report and Order* ¶ 25. Lease and resale arrangements involving less than 25 percent of spectrum capacity are unaffected.

Likewise, Council Tree fails to show that the Commission's choice of a ten-year unjust enrichment period is an unreasonable way to carry out the statutory objective of preventing unjust enrichment. As the Commission explained, requiring DEs to pay back bidding credits if they lose their eligibility for them helps ensure that participants in the program are committed to becoming "competitive facilities-based service provider[s]."[22] At the same time, extending the reimbursement period helps to limit participation by entities that "do not intend to offer service to the public . . . or who intend to use bidding credits to obtain a license at a discount and later to sell it at the full market price for a windfall profit."[23]

Council Tree's claim that the new rules will frustrate the ability of DEs generally to participate in auctions by ending their access to capital is unsupported. Although Council Tree's own particular business plans might have to change as a result of the new rules, there is no evidence that the same would necessarily be true for other DEs. To the contrary, the Commission explained that in its extensive experience with spectrum allocation, ten years is not an unreasonably long investment horizon.[24] In any event, the purpose of the DE rules has never been to have DEs participate in auctions solely for the sake of participating in auctions. Rather, the rules are designed to encourage DEs to

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Far from being arbitrary and capricious, this tiered approach represented an eminently reasonable means of balancing the goals of encouraging participation by bona fide DEs while preventing unjust enrichment.

[22] *Second Report & Order* ¶ 36.

[23] *Reconsideration Order* ¶ 36; *see also id.* ¶ 40 ("It is important to remember that designated entities are provided with bidding credits in order to enable them to obtain spectrum and then provide facilities-based services to the public. To the extent that they do not do so, but instead sell their licenses to others in the marketplace at market prices, we believe that it is reasonable that they no longer be allowed to enjoy the benefit of obtaining spectrum at below-market prices.").

[24] *Id.* ¶ 39.

become facilities-based providers of service. Even if the 10-year unjust enrichment period impedes bidding by some DEs, that rule change makes it more likely that those DEs that do win licenses will become genuine facilities-based providers.

Finally, Council Tree mischaracterizes the Commission's rules (Mot. 11) by claiming they would prevent a DE from "exit[ing] the business for ten years if the business plan is not succeeding." Under the rules, a DE may exit at any time, and it may sell its licenses in the same way as any other bidder. The only limitation the rules impose is that the DE must return some or all of its bidding credit – all of the credit if it exits in the first five years but only a portion of it in years six through ten – if it sells its licenses to an entity that is not also a DE.[25]

B. Administrative Procedure Act

Council Tree contends (Mot. 13-16) that the Commission violated the Administrative Procedure Act by failing to give notice that it was considering the rule changes adopted in the order under review. This argument is also unlikely to prevail, because the Commission fully complied with the APA's notice-and-comment requirements.

As this Court has explained, "submission of a proposed rule for comment does not of necessity bind an agency to undertake a new round of notice and comment before it

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[25] *See Second Report & Order* ¶ 37. In footnotes, Council Tree refers obliquely to another argument under section 309(j), namely, that the Commission allegedly failed to comply with its statutory obligation to "ensure that interested persons have a sufficient time to develop business plans" after issuance of auction bidding rules. *See* Mot. at 10 n.15, 16 n.25; 47 U.S.C. § 309(j)(3)(E)(ii). Assuming that this undeveloped claim is properly before the Court, it lacks merit. As the Commission explained, the new rules do not even implicate this statutory provision; there was ample notice of impending changes to the DE rules; and the Commission rescheduled the auction in order to provide

adopts a rule which is different – even substantially different – from the proposed rule."[26] The relevant inquiry is whether the notice "would fairly apprise interested persons of the 'subjects and issues' before the Agency."[27] Here, the *Further Notice* provided ample notice of the "subjects and issues" the agency was considering in its effort to eliminate abuse of its DE rules. That the comments filed in response to the *Further Notice* convinced the Commission to modify some of the specific rules it originally proposed (and which Council Tree would have preferred) does not mean that the notice was inadequate.

Material relationship rules. The *Further Notice* provided ample notice of the new material relationship rules.[28] Contrary to Council Tree's characterization (Mot. 5), the *Further Notice* did not solicit comment solely on Council Tree's specific proposal regarding "large in-region incumbent wireless service providers." It also sought comment on whether any "*other* 'material relationships' . . . should trigger a restriction on the award of designated entity benefits."[29] Likewise, the *Further Notice* asked parties to address whether or not limiting prohibited "material relationships" in the way proposed by Council Tree would be "sufficient to address any concerns that our designated entity

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applicants additional time for preparation and planning. *See Reconsideration Order* ¶¶ 8-13.

[26] *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977).

[27] *Id.*; *see* 5 U.S.C. § 553(b)(3) (agency engaged in rulemaking must give advanced notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved").

[28] *See Reconsideration Order* ¶¶ 14-21 (explaining how the *Further Notice* provided notice of the rules); *see also CMC Real Estate Corp. v. ICC*, 807 F.2d 1025, 1034 (D.C. Cir. 1986) ("It is well established that an agency's interpretation of the intended effect of its own orders is controlling unless clearly erroneous.").

[29] *Further Notice* ¶ 13 (emphasis added); *see also Reconsideration Order* ¶ 16.

program may be subject to potential abuse from larger corporate entities."[30] Parties had clear notice that the Commission contemplated addressing "material relationships" with entities other than large wireless carriers.

In addition, the *Further Notice* gave parties ample notice that the "subject[] and issue[]" of how to define a material relationship was part of the proceeding. It broadly sought comment "on the specific nature of the relationship that should trigger . . . a restriction."[31] And, though Council Tree suggests (Mot. 14-15) that the Commission's concern about DEs' lease and resale agreements came out of the blue, in fact the *Further Notice* specifically sought comment on what "standard should be used to determine whether a spectrum leasing arrangement is a 'material relationship.'"[32]

Comments filed in response to the *Further Notice* demonstrate that parties understood the scope of the proceeding.[33] For example, commenters offered varying opinions on whether the "material relationship" rules should be revised to cover relationships only with incumbent wireless carriers or also with other "strategic investors."[34] Moreover, Council Tree's own comments cited DEs' spectrum lease and resale arrangements as examples of "manipulating the [DE] program."[35]

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[30] *Further Notice* ¶ 15; *see also Reconsideration Order* ¶ 16.
[31] *Further Notice* ¶ 13; *see also Reconsideration Order* ¶ 17.
[32] *Further Notice* ¶ 16; *Reconsideration Order* ¶ 18.
[33] *See Fertilizer Inst. v. Browner*, 163 F.3d 774, 779 (3d Cir. 1998) (that comments were filed addressing an issue is evidence that notice of proposed rulemaking provided sufficient notice of it).
[34] *Reconsideration Order* ¶ 19.
[35] *Id.* ¶ 19 & n.54.

Unjust enrichment period. The *Further Notice* also provided notice that the "subject[] and issue[]" of the length of the unjust enrichment period was part of the proceeding. It squarely asked parties to address "over what portion of the license term should . . . unjust enrichment provisions apply?"[36] Council Tree did just that, acknowledging that the Commission sought "comment regarding over what portion of the license term should the unjust enrichment provisions apply" and arguing for five years.[37] Other parties advocated a longer time period.[38] Both the *Further Notice* and the comments filed in response to it provide powerful evidence that parties were on notice that the Commission contemplated changes to the unjust enrichment time period. Though Council Tree has suggested that the *Further Notice* contemplated changing the length of the unjust enrichment period with respect only to the kinds of material relationships it proposed, the Commission reasonably concluded that changing the length of the unjust enrichment period for "certain types of transactions but not for others . . . would have risked creating an illogical scheme that would have created an incentive for designated entities to prioritize certain types of transactions over others.[39] In such circumstances, there can be no question that the notice "fairly apprise[d] interested persons of the 'subjects and issues' before the Agency."

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[36] *Further Notice* ¶ 20; *Reconsideration Order* ¶ 32.
[37] *Reconsideration Order* ¶ 34.
[38] *Id.*
[39] *Id.*, ¶¶ 33, 35.

C. Regulatory Flexibility Act

Council Tree's suggestion (Mot. 16-17) that the Commission failed to comply with the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq*. (RFA), is baseless. The Commission fully satisfied its duties under the statute by providing notice of its rule changes and by conducting Regulatory Flexibility Analyses.[40] As required by section 604 of the Act, the Commission's *Second Report & Order* included a Final Regulatory Flexibility Analysis that explained the need for and objectives of the rules, addressed the only RFA comments raised in response to the Initial Regulatory Flexibility Analysis,[41] described the small entities to which the proposed rules would apply, described the projected reporting, recordkeeping, and other compliance requirements, and explained the steps the Commission took to minimize significant economic impacts of the rules on small entities.[42] The *Reconsideration Order*, moreover, addressed Council Tree's newly-raised RFA claims. The Commission's orders thus "demonstrate[e] a 'reasonable, good-faith effort to carry out [the RFA's] mandate.'"[43] That is all that the statute requires.

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[40] *See Reconsideration Order*, ¶¶ 43-44.

[41] *See Second Report & Order*, App. C n.210. Thus, Council Tree errs when it suggests (Mot. 17 n.27) that the Commission's Final Regulatory Flexibility Analysis did not note or address public comments as required by 5 U.S.C. § 604(a)(2).

[42] *See generally Second Report & Order*, App. C.

[43] *See United States Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001) (quoting *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000)). Council Tree's reliance (Mot. 17) on *Southern Offshore Fishing Association v. Daley*, 995 F.Supp. 1411, 1436 (M.D. Fla. 1998) is misplaced. In that case, unlike this one, the agency erroneously certified that no initial regulatory flexibility analysis was needed and did not conduct one. *See id*. at 1434-35.

II. THE BALANCE OF HARMS AND THE PUBLIC INTEREST DO NOT SUPPORT A STAY

A. Council Tree has not shown that it would suffer irreparable harm in the absence of a stay.

To demonstrate the sort of "irreparable harm" that would warrant a stay, Council Tree must establish that the injury it would suffer in the absence of a stay is "both certain and great," and "actual and not theoretical."[44] Council Tree has failed to make this showing. Instead, it relies (Mot. 17-18) on declarations asserting that the revised DE rules prevented it from carrying out never-consummated investment agreements on which it had been working. Neither declaration makes a concrete showing that Council Tree actually would have been able to secure financing under the prior rules, or that it could have competed successfully to acquire licenses in the upcoming AWS auction.

More importantly, even if Council Tree could show that it will be harmed if the auction is conducted under the new rules, it has failed to show that the harm will be irreparable. In other words, Council Tree has not overcome the presumption "that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation."[45] It asserts (Mot. App. 1 (Hillard Decl. ¶ 12)) that "[u]nwinding the AWS Auction once it has occurred will be a prolonged, complex, expensive and uncertain process," but it does not contend that this Court would lack the power to cancel the auction if it determines that the Commission's rules are unlawful.

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[44] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).
[45] *Sampson v. Murray*, 415 U.S. 61, 90 (1974).

In any event, Council Tree errs in suggesting (Mot. 18 n.28) that there is "no 'replacement opportunity' for the AWS Auction," because even in the absence of specific court-ordered relief, it likely will have other chances to purchase licenses as a DE.[46]

Courts previously have rejected similar claims of irreparable harm with respect to spectrum auctions. For example, in *FCC v. Radiofone, Inc.*, 516 U.S. 1301 (1995) (Stevens, J., Circuit Justice), the Sixth Circuit had granted a stay of an FCC spectrum auction, "[a]pparently . . . fear[ing] that completion of the auction would moot a challenge" to FCC regulations that prevented a party from bidding for certain licenses. *Id*. In his capacity as Circuit Justice, Justice Stevens vacated the stay because he recognized that "allowing the national auction to go forward [would] not defeat the power of the Court of Appeals to grant appropriate relief in the event that respondent overcomes the presumption of validity that supports the FCC regulations and prevails on the merits." *Id*. That reasoning is fully applicable here, and it fatally undermines Council Tree's claims of irreparable harm.

B. A stay would harm other parties.

While Council Tree has failed to demonstrate a likelihood of concrete and irreparable harm in the absence of a stay, the Commission found[47] – and there is strong reason to believe – that a grant of the stay request would cause serious harm to others. For example, in opposing Council Tree's earlier request that the Commission issue a stay, the wireless industry argued that the delay caused by a stay would unfairly harm the

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[46] Congress has required 60 megahertz of spectrum in the 700 MHz band to be auctioned by January 2008. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4. And a number of existing licenses presumably will become available on the secondary market, as well.

[47] *Reconsideration Order* ¶ 12.

many prospective participants that have an immediate need for additional spectrum and have already structured their contractual and financial arrangements to participate in the auction.[48] There also was record evidence that "delaying the auction further will impede the ability of smaller entities to successfully obtain licenses."[49] Indeed, before the Commission rejected the specific rule amendments that Council Tree had proposed, even Council Tree had told the Commission that "the auction of AWS-1 licenses is a critical opportunity for smaller carrier and new entrants to acquire access to vital spectrum resources, . . . *and that opportunity should not be delayed*."[50] Under these circumstances, the harm that delay would cause the many other prospective bidders dwarfs the effect, if any, that the new DE rules may have on Council Tree's particular business plans.

C. A stay would harm the public interest.

A stay of the auction and the Commission's new DE rules would not serve the public interest. On the contrary, the delay caused by a stay would directly conflict with Congress's stated objective of promoting the "rapid deployment of new technologies, products, and services for the benefit of the public . . . *without administrative or judicial delays*."[51] From the beginning of the DE rulemaking, the Commission has stressed the

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[48] CTIA – The Wireless Association Opposition to Motion for Expedited Stay Pending Reconsideration or Judicial Review, WT Docket No. 05-211, filed May 11, 2006, at 14-15 (attached as Exhibit D, Tab 6 to Movants' stay motion); *see also* T-Mobile USA, Inc. Opposition to Stay, WT Docket No. 05-211, filed May 12, 2006, at 14-15 (arguing that "companies like T-Mobile *currently* have tens of millions of wireless customers, virtually all of whom are demanding high quality, reliable, ubiquitous service") (emphasis in original) (attached as Exhibit D, Tab 7 to stay motion).

[49] *Reconsideration Order* ¶ 12.

[50] Comments of Council Tree Communications, Inc., WT Docket No. 05-211, filed February 24, 2006, at 61 (emphasis added) (attached as Exhibit B, Tab 3, to Movants' stay motion).

[51] 47 U.S.C. § 309(j)(3)(A) (emphasis added).

need to complete the AWS auction in a timely manner – specifically emphasizing its intent "to complete this proceeding in time so that any modifications to our rules resulting from this proceeding will apply to the upcoming auction of licenses for Advanced Wireless Services."[52] As the D.C. Circuit has explained, this assessment by the responsible agency is itself a critical factor in determining how "the public interest should be gauged."[53]

A stay not only would conflict with the FCC's view of the public interest, it also would undermine the goals of the Commercial Spectrum Enhancement Act (CSEA").[54] In accordance with that statute, many different federal agencies have worked together to relocate existing government users from the spectrum that is the subject of the upcoming auction. After coordinating with the FCC, the Commerce Department's National Telecommunications and Information Administration ("NTIA") issued a relocation report on expected relocation costs and timelines in December 2005, which freed the Commission to schedule the AWS auction this summer. In a public announcement, NTIA has characterized the prospective auction as "great news for American consumers and the U.S. economy" – "a way to open up 'beach front' spectrum for key economic activity without jeopardizing our national security."[55] A stay of the auction would frustrate these coordinated efforts and delay these public benefits.

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[52] *Further Notice*, ¶1.
[53] *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985).
[54] Pub. L. No. 108-494, 118 Stat. 3986, Title II (2004) (codified in various sections of Title 47 of the United States Code).
[55] http://www.ntia.doc.gov/ntiahome/press/2005/relo_12282005.htm

For all these reasons, the Court should follow Justice Stevens's earlier conclusion in similar circumstances that "the harm to the public caused by a nationwide postponement of the auction would outweigh" any possible harm to Council Tree's interests.[56]

CONCLUSION

The motion for a stay should be denied.

Respectfully submitted,

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[56] *FCC v. Radiofone*, 516 U.S. at 1301-02.

CERTIFICATE OF SERVICE

I certify that on this 15th day of June, 2006, I served copies of the foregoing Opposition of Federal Communications Commission to Emergency Motion for Stay Pending Review by causing them to be delivered to the following parties by U.S. mail (and, where designated, by electronic mail):

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